BRUNEI REPORTS

Yong Foo Kee v Public Prosecutor

HIGH COURT — CRIMINAL APPEAL NO 15 OF 1991
MCMULLIN COMMISSIONER
3 DECEMBER 1991

Criminal Procedure *— Sentence — Theft of motor vehicle — Joy-ride — Offence could be one under Road Traffic Act — Prevalence of such offence — Deterrent sentence — Youthful offender — Desirability of deterrent sentence — Penal Code (Cap 22) s 379 — Road Traffic Act s 36 — Criminal Procedure Code s 262*

The appellant, who was under 17 years of age, together with an adult, committed theft of a motor car. The car was stolen as the appellant was stranded in town with no means of transportation home. He was sentenced to three months' imprisonment, the sentencing magistrate observing that a deterrent sentence was called for given the prevalence of such offences. The appellant appealed against the sentence.

Held, allowing the appeal:

(1) Although the act complained of did constitute theft, in its essence it was really more an offence of taking away of a vehicle without the owner's consent. However, that did not detract from the seriousness of the act itself in taking the vehicle for personal convenience and abandoning it thereafter.

(2) No statistics had been placed before the magistrate as to the increase in the incidence of theft of motor cars. Where any magistrate was making reference to the prevalence of the offence, he should, before deciding the case upon that basis, have some evidence to support the view that the offence had sharply increased.

(3) Imprisonment for a period of three months would not necessarily have the effect upon the appellant's character that such institutions were supposed to have. The appellant had already spent five days in custody, an experience which at his age would no doubt be both unpleasant and salutary.

(4) The appellant was placed on probation for one year.

Case referred to

1 *PP v Ak Abd Manan bin Pg Bakar* (Criminal Appeal No 15 of 1985) (unreported) (refd)

Legislation referred to

Criminal Procedure Code s 262
Penal Code (Cap 22) s 379
Road Traffic Act s 36

James Chiew (*Abrahams Davidson & Co*) for the appellant.
Ivan Leong (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

McMullin Commissioner: The appellant, Yong Foo Kee, is a boy of just under 17 years. In the company of a young man aged 22, he appropriated a motor car in the town of Kuala Belait on 6 July 1991. The time was about 9pm and it appears that there were no buses at that hour available to return from Belait to Seria, where they lived.

They had come upon the car by accident, and they discovered that the owner had somewhat carelessly left the keys in the ignition. It was a Toyota Kijang registration no KE4320. The older man got in on discovering that it was unlocked and the first defendant also got in. Together they drove away with the first defendant, that is the appellant, driving. He does not own a driving licence, being then below the age at which such a licence would be available to him.

At Seria, it seems that the car was driven into a field and abandoned. The two presumably went home but information concerning them led the police to them and they were arrested and charged before the magistrate at Seria on 8 October. They had thus escaped detection for some three months but when brought before the court, they both pleaded guilty to an offence under s 379 of the Penal Code (Cap 22) read with s 34 of the same Code.

In imposing sentences of three months upon both of the defendants, the magistrate said: 'I have to take into account public interest, theft cases are now on the increase, I feel that it is right for me to pass custodial sentence here.' He also made an order returning the car to the owner.

Mr James Chiew, appearing for him in this court, has stressed his youthful age and I am told, and I accept, that the boy was in employment for about one month prior to the time of his arrest. He is a first offender.

Mr Chiew has cited to me a number of the usual authorities in relation to sentence. The only one to which I wish to refer to is the case of *PP v Ak Abd Manan bin Pg Bakar*,[1] which case came on appeal before Mr Commissioner Liu in that year.

The appellant in that case was a youth of 17, convicted of various road traffic offences including driving without valid third party insurance. There was, of course, no question of theft in that instance. He was however given one month's imprisonment. Various letters were received by the court in support of his good character. He was a first offender, and in relation to that, the learned Commissioner said, at p 221 of the volume:

> It is the law that a public deterrent sentence would not be as a rule imposed in the case of a youthful first offender.

Mr Chiew points out also that it would have been possible to charge this particular offender under s 36(2) of the Road Traffic Act, the taking away of a vehicle without the owner's consent, and I think it may be said that, although this did constitute a theft, in its essence it was really the latter rather than the former crime. That does not detract from the seriousness of

the act itself in taking the vehicle for personal convenience and abandoning it thereafter. A

Mr Leong who has very fairly agreed with his opponent on the desirability that young first offenders should not be treated in a deterrent way, has nevertheless heavily relied on the increased incidence of such offences. He presented to the court a precis showing the degree to which a variety of offences affecting motor cars has increased from 1988 to the present year. These may, of course, have varied from brief joy-riding to permanent appropriation. B

I need only note that the theft of cars has increased from 26 in 1988 to 68 in late 1991, October being the last month on record. That is a steep rise in such offences; whether it conforms to the description of an epidemic is something I prefer not to propound upon. C

I think it was perhaps unfortunate that some form of such statistics was not placed before the magistrate at the time of the trial, and I think it would always be preferable, where any magistrate is making reference to the prevalence of the offence that he should, before deciding the case upon that basis, have some evidence to support the view that the offence has sharply increased. D

Mr Leong suggested that if in the present case probation were considered, I should direct my attention primarily to para (d) of s 262(1), which relates to the detention of youthful offenders — a description which applies to the present appellant. E

I do not think that that would not be an advisable course. I cannot imagine that detention within such an institution for a period of three months, reduced by whatever he has already served, would necessarily have the effect upon his character that such institutions are supposed to have; and as to the punitive aspect of the matter, it is true, as Mr Chiew has put it, that the appellant after arrest had already undergone detention for about five days, partly in prison, and partly in police custody. Such experience, at his age, was no doubt both unpleasant and salutary. F

If there were any question of previous record, I would have had no hesitation whatsoever in upholding the sentences imposed, but I do stress the fact that, this is a first offender and I repeat that in such a case, the object sought by the magistrate, which was deterrence, should have been more carefully examined before sentence was imposed with that purpose in mind. G

I therefore allow the appeal and set aside the sentence imposed, substituting therefor an order of probation under s 262(1) para (c) of the Criminal Procedure Code. The appellant will therefore enter into a bond to keep the peace and to be of good behaviour, for a period of 12 months. In breach of such a bond, he must appear and receive judgment before the court. The bond to be in the sum of $1,000. H

Appeal allowed.

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Reported by Mathavan Devadas